85-843

No.

Supreme Court, U.S.
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Supreme Court of the United States

October Term, 1985

THOMAS PAUL LONG,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

ROBERT J. ROTATORI, *Counsel of Record*
SUSAN L. GRAGEL
ROBERT A. RANALLO
GOLD, ROTATORI, SCHWARTZ & GIBBONS Co., L.P.A.
1100 Ohio Savings Plaza
Cleveland, Ohio 44114
(216) 696-6122
Counsel for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

39pp

QUESTIONS PRESENTED

1. In a criminal tax prosecution, where the defendant asserted good faith reliance on the advice of an accountant and bookkeeper, did the multiple, conflicting representation of the defendant, bookkeeper and accountant by defense counsel prejudicially deprive the defendant of his right to effective assistance of counsel under the Sixth Amendment to the United States Constitution?

2. Does the Sixth Amendment to the United States Constitution prohibit the multiple, conflicting representation of the defendant, and his accountant and bookkeeper in a criminal tax prosecution where the defendant asserted good faith reliance on the advice of his bookkeeper and accountant as a defense?

3. Did the district court's failure to conduct an adequate inquiry into the conflict of interest arising from defense counsel's joint representation of the defendant and his accountant and bookkeeper, and failure to independently advise defendant of the ramifications of the conflict of interest before trial, deprive defendant of his right to effective assistance of counsel under the Sixth Amendment to the United States Constitution?

TABLE OF CONTENTS

Questions Presented 1

Opinions Below 2

Statement of Jurisdiction 2

Constitutional Provision Involved 2

Statement of the Case 2

A. Events Leading to Indictment 2

B. Conflicting Representation by Counsel 4

C. Proceedings Before the District Court 5

D. Prejudicial Effects of Defense Counsel's Joint Representation 7

Reasons for Allowing the Writ 9

A. The Decision of the Sixth Circuit Is in Direct Conflict With the Sixth Amendment and With Prior Decisions of This Court 9

B. This Case Presents Ideal Facts and Circumstances Under Which This Court Can Consider and Define the Situations and Manner in Which Defense Counsel May or May Not Undertake Representation of Persons With Potentially Conflicting Interests 12

C. This Case Presents an Excellent Basis for Clarification by This Court of the District Court's Obligation to Insure That a Defendant Has Full and Complete Understanding About the Ramifications of His Attorney's Representation of Clients With Conflicting Interests Before Trial 15

Conclusion 17

Appendix:

Order of the United States Court of Appeals for the Sixth Circuit (September 24, 1985) A1
Judgment Entry of the United States District Court (May 16, 1984) A2
Judgment of Conviction and Sentencing Order of the United States District Court (July 27, 1984) A4
Judgment and Commitment Order of the United States District Court (July 27, 1984) A7
Excerpts of Transcript A10

TABLE OF AUTHORITIES

Cases

Argensinger v. Hamlin, 407 U.S. 25, 29-33 (1972) 9
Chapman v. California, 386 U.S. 18, 23 (1967) 9
Cuyler v. Sullivan, 446 U.S. 335, 355 (1980) 9, 10, 12
Glasser v. United States, 315 U.S. 60, 75 (1942) 10, 16
Holloway v. Arkansas, 435 U.S. 475, 483 n.5 (1978) 9, 10, 12
Mack v. United States, 635 F.2d 20 (1st Cir. 1980) 16
Thacker v. Bordenkircher, 590 F.2d 640 (6th Cir. 1979) 10
United States v. Agosto, 675 F.2d 965 (8th Cir. 1982) 10, 11, 12
United States v. Duklewski, 567 F.2d 255 (4th Cir. 1977) 16
United States v. Jeffers, 520 F.2d 1256, 1265-65 (7th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976) 11

United States v. Martinez, 630 F.2d 361 (5th Cir. 1980), *cert. denied*, 450 U.S. 922 (1981) 11
United States v. Warledo, 557 F.2d 721 (10th Cir. 1977) 16

Constitution

United States Constitution, Sixth Amendment 2, 9, 11, 12, 17

No.

Supreme Court of the United States

October Term, 1985

THOMAS PAUL LONG,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming petitioner's conviction for criminal tax violations under 26 U.S.C. Sections 7201 and 7206(1) on grounds that he was absolutely deprived of the effective assistance of counsel where his attorney jointly represented petitioner and his accountant and bookkeeper (in a case in which the petitioner asserted as a defense good faith reliance on the actions of the accountant and bookkeeper) and where the district court conducted virtually no independent inquiry into the extent of the conflict of interest and took no action to independently insure that petitioner understood the ramifications of the conflict of interest.

OPINIONS BELOW

The Opinion of the Court of Appeals is not reported but is printed in the Appendix hereto; p. A1. The judgment of the district court is not reported, but is printed in the Appendix hereto at pp. A2-A7.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on September 24, 1985. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

A. Events Leading to Indictment

Petitioner is the former president and sole shareholder of Long Chemical Company. That business was formed as a sole proprietorship in 1968 and incorporated in the mid-1970's.

Petitioner also owned other sole proprietorships. Two of these proprietorships leased motor vehicles and real estate to Long Chemical Company. Petitioner received rent from Long Chemical Company for use of the vehicles and properties.

Long Chemical Company employed a bookkeeper, Matilda Montoni, for 11 years until late 1981. Bookkeeper Montoni's duties included exclusive responsibility for the recording of purchase orders, sales and invoices on Long Chemical Company's financial records. Bookkeeper Montoni also bore sole responsibility for maintaining Long Chemical Company's accounts receivable ledger, sales journals, bank records, invoices, purchase orders and other records.

Petitioner placed singular reliance on Bookkeeper Montoni. She was petitioner's "right hand gal". Because petitioner travelled frequently and worked, at most, one day per week in the Long Chemical Company office, he relied primarily on Bookkeeper Montoni for maintenance of accurate financial records.

Long Chemical Company and petitioner also employed a certified public accountant, Harold Martin. Accountant Martin prepared Long Chemical Company's corporate income tax returns. He also prepared petitioner's personal income tax returns. Accountant Martin entered Long Chemical Company's offices at the end of each month, reviewed the corporation's financial records and prepared monthly financial statements from the information provided to him by Bookkeeper Montoni. Petitioner expressly instructed Bookkeeper Montoni to provide Accountant Martin with everything needed to prepare accurate financial reports.

Petitioner relied solely on Bookkeeper Montoni and Accountant Martin to (a) compute his annual salary from Long Chemical Company and (b) calculate the rental income due from Long Chemical Company to petitioner's sole proprietorships for use of the leased vehicles and real estate. Petitioner never received regular salary payments from Long Chemical Company. Instead, he periodically used corporate funds to pay his expenditures, reported this use to Bookkeeper Montoni and Accountant Martin, and relied on Bookkeeper Montoni and Accountant Martin to record these uses of funds in a "draw account" that had been established on the corporate records by Accountant Martin.

At some point, Bookkeeper Montoni and Accountant Martin breached their obligations to petitioner and Long Chemical Company. Without petitioner's knowledge, Bookkeeper Montoni began withholding some invoices from the corporation's financial records and recorded them, instead, on her personal steno pad. Although Bookkeeper Montoni mentioned the unrecorded invoices to Accountant Martin, the accountant inexplicably failed to include them when preparing the income tax returns for Long Chemical Company and petitioner.

B. Conflicting Representation by Counsel

In February, 1980, the Internal Revenue Service announced an audit of Long Chemical Company for fiscal years 1977-79. Accountant Martin submitted a power of attorney to the I.R.S., authorizing his actions on Long Chemical Company's behalf.

Accountant Martin and Bookkeeper Montoni met with I.R.S. agents but failed to disclose that selected invoices had been withheld by them from the corporation's finan-

cial records and tax returns. After independently determining that invoices had been unrecorded and unreported, the I.R.S. transferred the case to the I.R.S. Criminal Investigation Division. Petitioner retained defense counsel John Kennedy Lynch to represent him and Long Chemical Company in the investigation.

Although petitioner consistently asserted that he knew nothing about the unreported invoices and that the unreporting had been done, without authorization, by Bookkeeper Montoni and Accountant Martin, Defense Counsel deliberately undertook simultaneous representation of the three individuals in the investigation. For example, Defense Counsel represented Bookkeeper Montoni when she provided the I.R.S. with a sworn statement. In this statement, Bookkeeper Montoni testified that petitioner knew nothing about the unreported invoices.

Defense Counsel also represented Accountant Martin during all pretrial proceedings, despite the fact that the Government had notified Accountant Martin that he was a potential target of the investigation. Defense Counsel represented Accountant Martin when he provided sworn statements to the I.R.S. and in pretrial conferences with the prosecutor.

C. Proceedings Before the District Court

Immediately before trial, the prosecutor raised Defense Counsel's obvious conflict of interests with the district court. The prosecutor explained that Accountant Martin would be called as a primary Government witness and asked questions which would elicit testimony damaging to petitioner. The prosecutor asserted that Defense Counsel would be unable to conduct a vigorous cross-examination of Accountant Martin because of the dual

representation. According to the prosecutor, Defense Counsel would be required to choose between his *two* clients in propounding questions that would assist petitioner's defense, impeach Accountant Martin (a potential target in a future prosecution), or vice versa (Tr. 3-5; Appendix at pp. A10-A12).

After the district court heard the prosecutor's explanation of Defense Counsel's conflicting representation of petitioner, Accountant Martin and Bookkeeper Montoni, the court asked petitioner if he understood the conflict (Tr. 7; Appendix at p. A13). Before petitioner could respond or question the district court, the court resumed its statement and simply explained that it wanted to call the matter to petitioner's attention. The district court engaged in no dialogue with petitioner to explore his understanding and knowledge of the issues raised by Defense Counsel's overlapping representation.[1] Indeed, the district court heard only one response to the question of petitioner's understanding of the conflict problem. Petitioner responded: "I think so, but I will do whatever [Defense Counsel] Lynch tells me to do." (Tr. 6-8; Appendix at pp. A12-A14).

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1. During the conflict "hearing" the district court (a) never inquired about the theory of petitioner's defense, (b) never discussed how petitioner's defense, based upon reliance on the accountant, would be hampered by defense counsel's multiple representation, (c) failed to inquire about other conflicts of interest, such as defense counsel's simultaneous representation of Bookkeeper Montoni; (d) failed to discuss the fact that Accountant Martin, the key prosecution witness, would be also used as an "expert" witness for petitioner; (e) failed to insure that petitioner understood the problem concerning payment of fees by Accountant Martin to defense counsel; (f) never informed petitioner that his "reliance on the accountant" defense would be seriously, if not fatally, damaged by defense counsel's conflicting role; (g) declined to inform petitioner that his attorney would be hampered in his effective cross-examination of key prosecution witnesses and, (h) neglected to determine if defense counsel represented Accountant Martin in other matters.

Rather than engaging in a thorough colloquy with petitioner about his right to effective assistance of counsel, the district court simply called a recess and instructed Defense Counsel to explain the "difficulties" to petitioner. The district court impermissibly delegated its supervisory role to the attorney at the very center of the conflict, depriving petitioner of his fundamental rights.

After the recess, Defense Counsel informed the district court that he would no longer represent Accountant Martin. Although Accountant Martin did not retain successor counsel for the immediately ensuing trial, Defense Counsel briefly announced that the "current possible conflict" had been eliminated.

D. Prejudicial Effects of Defense Counsel's Joint Representation

At trial, Bookkeeper Montoni completely reversed her earlier statement under oath to the I.R.S. While Bookkeeper Montoni initially testified that petitioner knew nothing about the unreported invoices before the I.R.S., she testified at trial that petitioner knew about the unreporting.

Because Defense Counsel simultaneously represented petitioner and Bookkeeper Montoni, he conducted no meaningful cross-examination or impeachment of the bookkeeper during petitioner's trial. Obviously blocked by his duty to represent Bookkeeper Montoni and to refrain from divulging attorney-client confidences, Defense Counsel failed to examine Bookkeeper Montoni in detail at trial about potential reasons for the recanting of her prior sworn statements.

Moreover, Defense Counsel conducted no examination of Bookkeeper Montoni that could have conceivably elic-

ited testimony to support petitioner's defense—that he was unfamiliar with accounting procedures, and relied solely on Bookkeeper Montoni and Accountant Martin to handle his personal and corporate financial affairs. Defense Counsel did not question Bookkeeper Montoni at all about the paramount role that Accountant Martin played in the financial operations.

The conflicts of interest of Defense Counsel became equally apparent in his cross-examination of Accountant Martin at trial. In an effort to protect his client, Accountant Martin, who had been notified that he was a potential target of a criminal prosecution, Defense Counsel:

1. Failed to ask Accountant Martin about the reasons that he had never journalized the unreported invoices after being informed of their existence by Bookkeeper Montoni.

2. Did not ask Accountant Martin why he refrained from reporting the invoices on the corporate and personal tax returns after being informed of their existence;

3. Declined to develop the reasons for the filing of the amended tax returns;

4. Failed to ask Accountant Martin about reasons for his failure to disclose the unreported invoices to the IRS during the preliminary phases of the audit; and

5. Declined to question Accountant Martin about the extent of petitioner's reliance on his advice and services.

The reasons for Defense Counsel's superficial and hesitant cross-examination of Accountant Martin and Bookkeeper Montoni can only be attributed to Defense

Counsel's belief that he needed to protect each of his three clients, despite their conflicting interests. Had Defense Counsel vigorously examined his clients, Accountant Martin and Bookkeeper Montoni (who served as the key prosecution witnesses), the verdict would in all likelihood have been different. The jury would have had sufficient evidence to believe that petitioner relied in good faith on his financial advisors and had not knowingly violated the tax statutes. Because Defense Counsel failed to elicit the testimony that petitioner's defense required, petitioner's rights to a fair trial were completely circumvented.

REASONS FOR ALLOWING THE WRIT

A. THE DECISION OF THE SIXTH CIRCUIT IS IN DIRECT CONFLICT WITH THE SIXTH AMENDMENT AND WITH PRIOR DECISIONS OF THIS COURT.

This Court has consistently required sweeping adherence to a criminal defendant's Sixth Amendment right to effective assistance of counsel, unhampered by conflicts of interest. *E.g., Argensinger v. Hamlin,* 407 U.S. 25, 29-33 (1972); *Chapman v. California,* 386 U.S. 18, 23 (1967). As interpreted by the Court, the Sixth Amendment not only guarantees an accused counsel for his defense, but also requires "the assistance of an attorney unhindered by *any* conflict of interest." *Cuyler v. Sullivan,* 446 U.S. 335, 355 (1980). *Accord, Holloway v. Arkansas,* 435 U.S. 475, 483 n.5 (1978).

The Court has explained:

> [T]he assistance of counsel guaranteed by the Sixth Amendment contemplates that such assistance be un-

> tramelled and unimpaired by . . . one lawyer . . . simultaneously represent[ing] conflicting interests. *Holloway v. Arkansas,* 435 U.S. 474, 483 (1980), quoting, *Glasser v. United States,* 315 U.S. 60, 75 (1942).

Recognizing the importance of effective assistance of counsel without conflicting interests, the Court has ruled that prejudice must be presumed and convictions automatically reversed if an actual conflict of interest existed at trial. *Holloway v. Arkansas, supra. Cuyler v. Sullivan, supra. Accord, Thacker v. Bordenkircher,* 590 F.2d 640 (6th Cir. 1979).

Canon 4 of the Code of Professional Responsibility compels an attorney to preserve the confidences and communications of each of his clients. Canon 5 of the Code of Professional Responsibility requires an attorney to exercise independent professional judgment on behalf of each of his separate clients. These ethical obligations become insurmountable obstacles to effective representation when an attorney wrongly engages in an effort to jointly represent clients with competing interests.

As the Eighth Circuit recognized in *United States v. Agosto,* 675 F.2d 965 (8th Cir. 1982), an absolute conflict of interest arises when an attorney attempts to represent clients with adverse interests. An attorney who has obtained privileged information from one client may (a) be tempted to use that privileged information to impeach one client in the defense of another client or (b) fail to conduct rigorous cross-examination of one client to the prejudice of another out of fear of misusing confidential information. *United States v. Agosto,* 675 F.2d at 971. No matter which option the attorney attempts to take, rights are compromised and ethical standards are violated. The attorney becomes trapped by conflicting obligations

and, as a matter of law, fails to adequately represent his client who is on trial. *United States v. Agosto*, *supra*. *See also*, *United States v. Jeffers*, 520 F.2d 1256, 1264-65 (7th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976).

In this case, the Sixth Circuit faced an actual conflict of interest by Defense Counsel in his multiple, joint representation of petitioner, Accountant Martin, and Bookkeeper Montoni. The fact that this simultaneous representation occurred was not disputed.

The prejudice ensuing from Defense Counsel's overwhelming conflict of interest was also beyond question.[2] After all, the record disclosed that Defense Counsel engaged in no effort to attack the credibility of his former clients, Bookkeeper Montoni and Accountant Martin, when they, for the first time, gave damaging testimony against Petitioner. Defense Counsel made no attempt to support petitioner's defense that he had relied in good faith on Bookkeeper Montoni and Accountant Martin during defense counsel's examination of his two former clients.

Notwithstanding the egregious conflict of interest and the scant efforts of the district court to insure Petitioner's understanding of the conflict, the Sixth Circuit affirmed Petitioner's conviction. The Sixth Circuit's decision ignored the important rights of Petitioner to effective assistance of counsel and this Court's consistent pronouncement that conflicts of interest must be scrupulously avoided and prevented in criminal prosecutions.

Instead of adhering to the established rule that the Sixth Amendment compels conflict-free, adequate repre-

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2. *See United States v. Martinez*, 630 F.2d 361 (5th Cir. 1980), *cert. denied*, 450 U.S. 922 (1981) (defense counsel's failure to vigorously cross-examine a former client during defendant's trial compelled reversal of conviction).

sentation of an accused by counsel, the Sixth Circuit chose to ignore both the blatant conflicts of interest demonstrated before and during trial and the principles established by this Court. The Sixth Circuit has effectively encouraged representation of conflicting interests by defense counsel and applauded minimal, cursory review of conflict situations by the district courts. The decision by the Sixth Circuit, unless reviewed and reversed by this Court upon certiorari, will have disastrous consequences for criminal defendants in all types of prosecutions, within the Circuit.

B. THIS CASE PRESENTS IDEAL FACTS AND CIRCUMSTANCES UNDER WHICH THIS COURT CAN CONSIDER AND DEFINE THE SITUATIONS AND MANNER IN WHICH DEFENSE COUNSEL MAY OR MAY NOT UNDERTAKE REPRESENTATION OF PERSONS WITH POTENTIALLY CONFLICTING INTERESTS.

As discussed above, Canons Four and Five of the Code of Professional Responsibility prohibit attorneys from disclosing their clients' confidences and from exercising anything except independent professional judgment on behalf of each individual client. *See United States v. Agosto, supra.* The Sixth Amendment absolutely guarantees criminal defendants the right to the effective assistance by an attorney who is unimpeded by the conflicting representation of other individuals, *Holloway v. Arkansas, supra; Cuyler v. Sullivan, supra.*

In the face of these ethical obligations and constitutional mandates, defense attorneys are frequently called upon to represent high-ranking corporate officials and lower echelon corporate employees in criminal investigations. Defense attorneys are retained during the early

stages of criminal investigations to represent the corporation and its officers, agents and employees before government agents, administrative agencies and grand juries.

On some occasions, defense counsel is unable to ascertain whether a conflict of interest arises from the dual representation of a corporate officer and lower-ranking subordinates. The focus of the Government's investigation may be so unclear in the early phases of a prosecution that defense counsel is unable to conduct a thorough investigation and examination of the existence of conflicting interests. During the early stages of a criminal tax or other prosecution, the Government may be unable or unwilling to name the targets of the investigation, thus hampering a defense attorney's efforts to ascertain whether or not he is prohibited from engaging in representation of multiple employees because of conflicting interests.

In some prosecutions, a defense counsel may be able to ethically and adequately represent multiple employees, i.e. where none of the employees had culpable knowledge or participation in the alleged criminal acts or where all of the represented employees hold consistent defenses and interests. In other cases, such as the one at hand, defense counsel cannot engage in multiple representation of corporate employees, officers and agents because each of his "clients" assert conflicting defenses, knowledge, participation, and the like.

What steps should defense counsel follow to insure that he is not representing clients with potentially conflicting interests in the early phases of corporate criminal investigations? How should a defense attorney advise high-ranking corporate officers and lower-level employees about potential conflicts of interest? Should separate attorneys be engaged for each and every corporate officer,

agent and employee in *all* criminal investigations and prosecutions or can multiple representation by a single attorney be undertaken under some circumstances?

The Court has never directly addressed these types of questions about conflicts of interests arising in the corporate and business environment during criminal investigations. This case, which involves the clearly prohibited representation of individuals with competing interests by a single attorney, provides an ideal framework for answering many of the questions that arise about multiple representation.

The Government has placed increasing emphasis on the prosecution of white-collar, economic and corporate crimes, i.e. money-laundering, antitrust, securities and banking fraud, income tax violations, corporate racketeering. With the increasing number of prosecutions against corporations and individual corporate officers, more and more attorneys will find themselves in the situation faced by Defense Counsel in this case.

The defense bar, district courts, prosecutors, and the business community require clear guidance from this Court about the circumstances under which representation of multiple corporate employees can and cannot be undertaken by a single attorney. The Court should issue a writ of certiorari in this case to provide this guidance. Reasoned analysis by the Court of the multiple representation undertaken by Defense Counsel (and its effects on petitioner's ultimate trial and conviction) will establish limitations and parameters for multiple representation in all future proceedings.

C. THIS CASE PRESENTS AN EXCELLENT BASIS FOR CLARIFICATION BY THIS COURT OF THE DISTRICT COURT'S OBLIGATION TO INSURE THAT A DEFENDANT HAS FULL AND COMPLETE UNDERSTANDING ABOUT THE RAMIFICATIONS OF HIS ATTORNEY'S REPRESENTATION OF CLIENTS WITH CONFLICTING INTERESTS BEFORE TRIAL.

Before trial in this case, counsel for the Government informed the district court that Defense Counsel had represented the petitioner's bookkeeper and accountant during the pretrial proceedings and that this multiple representation would undoubtedly impede defense counsel's adequate representation of petitioner at trial. Despite this plain delineation of the conflict problems, the district court made no significant effort to explain the problems to petitioner or to ascertain petitioner's understanding of his rights and obligations. The district court took virtually no action to guard petitioner against the effects of his attorney's egregious conflict of interests.

Before trial in this case, the district court: (1) made general statements about Defense Counsel's multiple representation of three clients with competing interests; (2) failed to engage in any dialogue with petitioner to insure petitioner's understanding of the issue; (3) heard petitioner say that he would "do whatever [Defense Counsel] told him to do" about the conflict, and (4) relied on Defense Counsel, the person at the hub of the conflict, to explain the significant legal questions to petitioner during a court recess.

The district court is ultimately responsible for insuring that trial procedures are conducted fairly and

without prejudice to the rights of the accused or Government. *Glasser v. United States, supra.* When accepting waivers from a Defendant of any significant constitutional right, the district court must independently ascertain, through colloquy with the accused directly, that the accused understands his rights and is willing to waive them voluntarily. *See, e.g., United States v. Duklewski,* 567 F.2d 255 (4th Cir. 1977) (district court must provide defendant with sufficient information about counsel's conflict of interest to allow defendant to make an independent waiver); *Mack v. United States,* 635 F.2d 20 (1st Cir. 1980) (district court must engage in extensive interchange with defendant before accepting a change of plea); *United States v. Warledo,* 557 F.2d 721 (10th Cir. 1977) (district court must sufficiently explore defendant's right to proceed to trial pro se before accepting waiver of right to counsel).

This Court has never defined the precise manner in which district courts must explore conflicts of interest, explain the ramification of conflicts and the right to effective assistance of counsel to accused or insure that a Defendant's waiver of the right to effective counsel, in the face of his attorney's representation of conflicting interests, is knowing and voluntarily waived. The Court has never determined whether a district court is permitted to delegate some, or all, of its obligation to inform a defendant of the effects of a potential conflict of interest to defense counsel. This case, presents an excellent opportunity to define the district court's obligation in conflict situations. Guidance from the Court is sorely needed by the lower courts, defense attorneys and prosecutors in all federal jurisdictions.

CONCLUSION

The Sixth Circuit's decision in this case completely evaded this Court's prior interpretations of the Sixth Amendment mandate that criminal defendants be afforded the effective representation by counsel, free from hindering conflicts of interest. The decision below sets an entirely new and unconstitutional standard, permitting, without any significant review by district court, multiple, conflicting representation by defense attorneys.

Additionally, this case raises significant issues of first impression for this Court. With the increasing number of "white collar" corporate criminal investigations, the Court should define the circumstances and manner in which a single defense attorney may or may not undertake multiple representation of corporate officers and lower-level corporate officers, agents and employees. The Court should also establish standards for the pretrial review of potential and actual conflict situations by district courts. This case, and the facts underlying it, provides an excellent vehicle for this Court's definition of much-needed standards for the defense bar, prosecution and trial courts.

Accordingly, Petitioner prays that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

ROBERT J. ROTATORI, *Counsel of Record*
SUSAN L. GRAGEL
ROBERT A. RANALLO
GOLD, ROTATORI, SCHWARTZ & GIBBONS Co., L.P.A.
1100 Ohio Savings Plaza
Cleveland, Ohio 44114
(216) 696-6122
Counsel for Petitioner

APPENDIX

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed September 24, 1985)

No. 84-3713

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

THOMAS PAUL LONG,
Defendant-Appellant.

ORDER

BEFORE: ENGEL and MILBURN, *Circuit Judges;* WISEMAN, *District Judge.**

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration therof,

The Court finds that no prejudicial error intervened in the judgment and proceedings in the district court, and it is therefore ORDERED that said judgment be, and it hereby is, affirmed.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

/s/ JOHN P. HEHMAN

*The Honorable Thomas A. Wiseman, Jr., United States District Judge from the Middle District of Tennessee, sitting by designation.

JUDGMENT ENTRY OF THE UNITED STATES DISTRICT COURT

(Filed May 16, 1984)

Case No. CR84-23

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THOMAS PAUL LONG,
Defendant.

JUDGMENT ENTRY

The defendant, Thomas Paul Long, was indicted on February 14, 1984, in two counts for violating 26 U.S.C. § 7201 (attempt to evade and defeat tax) and in four counts for violating 26 U.S.C. § 7206(1) (making and subscribing an income tax return, under oath, which the person does not believe to be true and correct as to every material matter).

This matter came on for trial to a jury on April 30, 1984. On May 15, 1984, the jury unanimously returned verdicts of guilty on Counts I and III (violations of 26 U.S.C. § 7201) and Counts II, IV, V, and VI (violations of 26 U.S.C. § 7206(1)).

The jury was polled and each juror stated that the guilty verdicts were, in fact, his/her verdicts.

Accordingly, the Court hereby enters a judgment of guilty against the defendant as to Counts I and III (violations of 26 U.S.C. § 7201) and Counts II, IV, V, and VI (violations of 26 U.S.C. § 7206(1)).

The Court then continued this matter for sentencing pending a presentence report from the Federal Probation Department.

Bond was continued at $5,000 personal.

IT IS SO ORDERED.

/s/ ALVIN I. KRENZLER
United States District Judge

JUDGMENT OF CONVICTION AND SENTENCING ORDER OF THE UNITED STATES DISTRICT COURT

(Filed July 27, 1984)

Case No. CR84-23

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THOMAS PAUL LONG,
Defendant.

JUDGMENT OF CONVICTION AND SENTENCING ORDER

The defendant, Thomas Paul Long, was indicted on February 14, 1984, in two counts for violating 26 U.S.C. § 7201 (attempt to evade and defeat tax) and in four counts for violating 26 U.S.C. § 7206(1) (making and subscribing an income tax return, under oath, which the person does not believe to be true and correct as to every material matter).

This matter came on for trial to a jury on April 30, 1984. On May 15, 1984, the jury unanimously returned verdicts of guilty on Counts I and III (violations of 26 U.S.C. § 7201) and Counts II, IV, V, and VI (violations of 26 U.S.C. § 7206(1)).

The Court entered a judgment of guilty against the defendant as to all six counts in the indictment and referred the matter for sentencing pending a presentence report.

This matter came on for sentencing on Wednesday, July 25, 1984, at 4:00 p.m. Present at the sentencing was the defendant represented by his privately-retained counsel, John Kennedy Lynch, Esq. Representing the government was John Siegel, Assistant United States Attorney.

Counsel for the defendant informed the Court that he had reviewed the presentence report with the defendant. The Court then asked counsel for the defendant and the defendant himself whether either wished to make a statement in the defendant's behalf and to present any information in mitigation of punishment. Counsel for the government was given an equivalent opportunity to address the Court.

The Court then sentenced defendant as follows. On Count I of the indictment, defendant is sentenced to three (3) years in the custody of the Attorney General; on Count II of the indictment, defendant is sentenced to three (3) years in the custody of the Attorney General; on Count III of the indictment, defendant is sentenced to three (3) years in the custody of the Attorney General; on Count IV of the indictment, defendant is sentenced to three (3) years in the custody of the Attorney General; on Count V of the indictment, the defendant is sentenced to three (3) years in the custody of the Attorney General; and on Count VI of the indictment, defendant is sentenced to three (3) years in the custody of the Attorney General. The sentences on all six counts are to run concurrently.

Accordingly, a judgment of conviction is entered against the defendant in two counts for violation of 26 U.S.C. § 7201 (attempt to evade and defeat tax) and in four counts for violation of 26 U.S.C. § 7206(1) (making and subscribing an income tax return, under oath, which the person does not believe to be true and correct as to every material matter).

The defendant is to report to the institution designated by the Bureau of Prisons to have custody of the defendant on August 27, 1984, before 10:00 a.m. to begin serving his sentence.

Bond is continued at $5,000 personal.

IT IS SO ORDERED.

/s/ ALVIN I. KRENZLER
United States District Judge

JUDGMENT AND COMMITMENT ORDER OF THE UNITED STATES DISTRICT COURT

(Dated July 27, 1984)

UNITED STATES DISTRICT COURT

UNITED STATES OF AMERICA
vs. THOMAS PAUL LONG
DOCKET NO. CR84-23

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date 7-25-84

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel

[X] WITH COUNSEL John Kennedy Lynch

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea,

[ ] NOLO CONTENDERE,

[X] NOT GUILTY

There being a verdict of

[ ] NOT GUILTY. Defendant is discharged

[X] GUILTY

Defendant has been convicted as charged of the offense(s) of

> two counts for violating 26 U.S.C. § 7201 (attempt to evade and defeat tax) and four counts for violating 26 U.S.C. § 7206(1) (making and subscribing an income tax return, under oath, which the person does not believe to be true and correct as to every material matter.)

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

> three (3) years as to Count I; three (3) years as to Count II; three (3) years as to Count III; three (3) years as to Count IV; three (3) years as to Count V; three (3) years as to Count VI. The sentences on all six counts are to run concurrently.
>
> The defendant is to report to the institution designated by the Bureau of Prisons to have custody of the defendant on August 27, 1984, before 10:00 a.m. to begin serving his sentence.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may

issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

/s/ A. I. Krenzler

Date: 7/27/84

EXCERPTS OF TRANSCRIPT

[3] MONDAY MORNING, APRIL 30, 1984

The Court: Fellows, do you want to talk to me?

Mr. Siegel: Yes, your Honor.

The Court: Okay, let the record show that we are here on the Long case, and do you have some pre-trial motions or something?

Mr. Siegel: Your Honor, excuse me. At this point I believe it is important before we bring the jury in to raise the matter of at least the potential conflict of interest and make sure that on the record the matter is addressed, inquiry is made of the defendant so that it is clear he understands the potential conflict and that he can waive that if he so chooses.

What that relates to is I just learned sometime last week that Mr. Lynch at one point at various times has represented Harold Martin who is the tax return preparer for Mr. Long.

I understand he is going to be at counsel table or requested to be at counsel table to serve as an expert witness, but he is also a government witness. There are some facts he could testify to if he testifies consistently with what he told us in the past, which is what the government considers to some degree in the government's favor and harmful to the defendant.

[4] I think the law is pretty clear there is a great danger for conflict in a situation where a defendant has an adversary witness testify against him who was a client of his attorney at the trial. The problem that the cases point out is there can be a situation where there is a

concern that the defense attorney for Mr. Long might not be able to effectively or he has a conflict in cross examining that witness at least on points of harmful testimony because since it is his client, he might not want to bring out things that are not in the client's or witness' interest to bring out, the witness-client interest, but it might be in the interest of the defendant.

Secondly, when I learned of this when I asked Mr. Martin to come in for a pre-trial conference, Mr. Lynch advised me he would be coming along also because he in fact, represented him. He was going to be representing him as an attorney at the pre trial conference and possibly the trial, and I raised the conflict to Mr. Lynch at that time.

In addition, it is a problem because I am concerned, and I told Mr. Lynch this also, maybe some things that Mr. Martin could testify to which would be potentially harmful to him, matters of incrimination to him, and, again, it might cause a problem when with Mr. [5] Lynch's prosecutor putting him on as a witness on cross examination. I don't think it is a problem if he wants to call someone. Well, I don't say it is a problem if he calls a witness, putting on a witness where that witness might have some incrimination problems and Mr. Lynch dealing with how to handle that in a way in the interest of both clients.

So, if Mr. Martin is going to be a witness in the trial and Mr. Lynch is going to cross examine, I think this should be made clear to Mr. Long, and I think it should be made clear to Mr. Lynch. I discussed it with Mr. Long, and he understands the risk in waiving them and waiving any claim of ineffective assistance of counsel as a result of the potential conflict.

The Court: Mr. Lynch?

Mr. Lynch: One other thing. I think the case law in that type of situation is clear that the Court should actually inquire of the defendant.

The Court: Sure. Mr. Lynch?

Mr. Lynch: Your Honor, I don't see any problem here. Mr. Martin who was the C.P.A. prepared all the tax returns that are involved in this case. He also prepared amended tax returns. Now, Mr. Martin has assisted Mr. Long and myself during the I.R.S. investigation. He is going to sit at counsel table, your [6] Honor, and assist in presentation of the case. I need his advice and assistance because he has done the accounting work and has knowledge of many transactions only he knows of, and I have to use him as a witness, and I don't object to the government calling him as a witness; and if I did, it would not matter, but I didn't represent Mr. Martin, but during the investigation Mr. Martin wanted me to represent him during various I.R.S. investigations and by Mr. Siegel, and Mr. Long is fully aware of this fact and has no objection, whatsoever, and I think he will be perfectly willing to inform the Court of that fact.

The Court: Who is Mr. Long?

Mr. Lynch: Mr. Long, stand, please.

The Court: Mr. Long, I want to explain what is going on here so we can proceed. The government has raised a question, and properly so, because anytime they believe there is a potential conflict, they call it to the Court's attention, and what happens is somewhere we try the case and ultimately it turns out unfavorably to you. Later on you may have the opportunity to raise an ineffective assistance of counsel argument which we get in all kinds

of cases which means in any collateral proceeding, so if we know about these up front, we can resolve them. That does not mean if you charge there is a conflict you get you another lawyer or if there is a [7] potential, you can raise that right. So you are entitled to the defense you can have, and you should be free of any potential or actual conflict of interest. In other words, the lawyer should do what is best for you and not render any decision he makes in preparation of the trial that may compromise your position in any way because he is worrying about another client.

In other words, if something is going on between you and someone else and your lawyer represents both and they put you in a compromising position, we want the lawyer representing you to give you the best he has, and the best defense possible, and Mr. Siegel from the U. S. Attorney's office has raised some of these issues.

Were you aware of all these potential issues or are you now? Are you aware that Mr. Lynch represented or had done some work for Mr. Martin during these proceedings?

The Defendant: Yes.

The Court: And are you aware, as Mr. Siegel said—and I would have no knowledge of all this until it happened—that it is possible you and Mr. Martin may be on a collision course somewhere along the line. Are you aware of that possibility?

The Defendant: Only if I were to—

The Court: What I am getting at with you, assuming you know all that, and it is now brought out [8] by Mr. Siegel—I don't know—a lot of this is hindsight, and I want to make sure they are called to your attention and you

have the privilege of waiving them just so your waiver is knowingly and intelligently. In other words, I have got to call it to your attention. You have got to think about it decide whether you are willing to have Mr. Lynch prepare your defense, which means you cannot raise that argument effectively, assuming the case turns out not to your best interest. Do you understand what I am saying?

The Defendant: I think so, but I will do whatever Mr. Lynch tells me to do.

The Court: I am going to take a short recess. I want Mr. Lynch to explain to you what this is all about, and I will come back and ask you some more questions, and I will give you an opportunity either to waive any potential conflict—not saying there is one, but if you want to get another lawyer, fine, but I want to make sure you understand all the issues.

Mr. Siegel: One issue that I think should be discussed is whether Mr. Lynch anticipates representing Mr. Martin not only just in this matter, but in other matters, whether he has in his client other matters he expects to or expects money from him, so we won't have the idea Mr. Lynch, because Mr. Martin is a client in other [9] matters, might want to make sure the relationship stays good. That is another issue I think about—

The Court: Well, I think Mr. Lynch understands the law in all these areas. I just want him to make sure he makes the full disclosure to Mr. Long and then we will come back in open Court and Mr. Long will make the waiver, and we will proceed. We are not trying to take your lawyer away; we are trying to make sure we don't have a headache in the future, and I have to try the case twice. After that, we will bring the jury in.

Thereupon a lunch recess was had.

The Court: Be seated. Mr. Lynch, did you advise your client and communicate with him?

Mr. Lynch: Yes, your Honor, I have.

The Court: Do you want to tell us what you told him?

Mr. Lynch: Possibility of conflict of interest.

Now, I have already advised Mr. Martin sometime ago, a few days ago I am no longer representing him, so there really isn't any current possible conflict as I see it, and I explained that to Mr. Long. In fact, I told the whole thing to Mr. Long several days ago. It isn't anything new.

He was aware of this, and he has advised me he has [10] no objection to me continuing to represent him.

Mr. Martin has, of course, during the investigation and part of that time been very close to Mr. Long. They worked together and Mr. Martin is going to be one of our key witnesses, but I can't see—Mr. Long, I can't speak for him. He will be glad to speak for himself—but I see no possible problem in proceeding with the trial and—

The Court: Mr. Long, has Mr. Lynch explained all these things to you in addition to what Mr. Siegel said?

The Defendant: Yes, your Honor, he has.

The Court: You are satisfied then that Mr. Lynch can give you adequate and able representation, and you are not concerned about any potential conflict of interest?

The Defendant: No, sir. I am very happy with him.

The Court: Are you ready to proceed?

The Defendant: Yes.

The Court: Anything else? We will proceed that way. Mr. Lynch can continue representing Mr. Long. I'm sorry I took so long this afternoon. I gave you a little extra time. I thought you might resolve your differences.

Supreme Court, U.S.
FILED
JAN 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-843

In the Supreme Court of the United States

OCTOBER TERM 1985

THOMAS PAUL LONG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

6 pp

TABLE OF AUTHORITIES

Page

Cases:

Cuyler v. *Sullivan*, 446 U.S. 335 2

Theodore v. *New Hampshire*, 614 F.2d 817 3

United States v. *Cunningham*, 672 F.2d 1064, cert. denied, No. 83-1543 (Apr. 23, 1984) 3

United States v. *Jeffers*, 520 F.2d 1256, cert. denied, 423 U.S. 1066 3

Statutes:

26 U.S.C. 7201 1

26 U.S.C. 7206(1) 1

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was denied effective assistance of counsel because his trial attorney labored under a conflict of interest.

1. Following a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted on two counts of attempted tax evasion, in violation of 26 U.S.C. 7201, and on four counts of making and subscribing false tax returns, in violation of 26 U.S.C. 7206(1). He was sentenced to concurrent terms of three years' imprisonment on each count. The court of appeals affirmed by judgment order (Pet. App. A1).

Petitioner was the president and sole shareholder of T. P. Long Chemical, Inc. In 1977, petitioner developed a scheme by which he attempted to conceal over $213,000 in corporate income during the years 1977 to 1979. As part of that

scheme, he instructed his bookkeeper, Matilda Montoni, not to record certain sales and receipts in the corporate sales journal and to deliver the checks for those receipts directly to him (Tr. 100-101, 158-167).[1]

Montoni's testimony was corroborated by the company's general manager, Bruce Bowers. Petitioner admitted to Bowers that he had taken out of the corporation about $200,000 more than his reported salary by personally cashing checks on unrecorded sales (Tr. 81-82).[2] Petitioner also revealed his scheme to two individuals who were interested in purchasing the company (Tr. 400-410, 440). To support his asking price, petitioner told the prospective buyers that the books substantially understated the corporation's true income, in part due to a large number of unrecorded sales (Tr. 406-408, 440-443).

2. Petitioner contends (Pet. 9-17) that he was denied effective assistance of counsel because his trial attorney labored under an actual conflict of interest. The court of appeals correctly rejected this fact-bound claim in a judgment order that is of virtually no precedential value and presents no conflict with the decisions of other courts of appeals. Review by this Court therefore is not warranted.

This Court held in *Cuyler* v. *Sullivan*, 446 U.S. 335, 348, (1980), that "[i]n order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial

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[1]Trial transcript references are taken from the government's brief in the court of appeals.

[2]Petitioner also informed Bowers that he would receive his bonus in the same fashion as had the previous manager; upon handing him a bonus check in October 1978, petitioner stated, "[h]ere is one of my famous checks * * *. Now, you are part of the conspiracy" (Tr. 118-120). In addition, petitioner rejected Bowers' attempt to hire an accounting firm to improve the bookkeeping system, on the ground that the present system was ideal for hiding income (Tr. 104-106).

must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." No such conflict existed here. Martin, petitioner's accountant and the preparer of his tax return, had been represented during the IRS investigation and at a pre-trial conference by petitioner's trial attorney, John Lynch (Tr. 3-4). At trial, the Government called Martin to explain his procedures in preparing petitioner's tax returns (Tr. 451-478). Martin was no longer represented by Lynch, and he made no attempt to invoke his attorney-client privilege on cross-examination (Tr. 5-10, 450-455). Compare *United States* v. *Cunningham*, 672 F.2d 1064, 1072 (2d Cir. 1982), cert. denied, No. 83-1543 (Apr. 23, 1984); *Theodore* v. *New Hampshire*, 614 F.2d 817 (1st Cir. 1980), *United States* v. *Jeffers*, 520 F.2d 1256, 1264-1266; (7th Cir. 1975), cert. denied, 423 U.S. 1066 (1976). Moreover, Martin was called by the defense to give detailed fact and expert testimony (Tr. 976-1098). In that capacity, Martin supported petitioner's defense that the diverted corporate receipts were actually "loans" that petitioner later repaid to the corporation (Tr. 916-919, 980-989; DX 000). Martin also challenged the Government's contention that petitioner had additional taxable income, and he confessed his own "error" in reporting additional taxable income on petitioner's amended tax returns (Tr. 1003-1004). Similarly, Martin catalogued numerous deductions that he claimed were omitted from petitioner's personal tax returns due to sloppy bookkeeping and that would offset any unreported income (Tr. 991-1001, 1009-1010). Finally, he personally took the blame for not reporting income on a number of petitioner's transactions (DX JJJ to PPP; Tr. 991-1004, 1008). In short, no conflict existed because Martin's testimony fully supported petitioner's theory of the defense.

The record also establishes that petitioner was fully aware of any possible conflict of interest arising out of his attorney's prior representation of Martin (Pet. App.

A10-A16). At the outset of trial, both the district court and the Assistant United States Attorney advised petitioner of the possible conflict of interest and how it might affect counsel's performance (*id.* at A10-A15). Petitioner acknowledged that he understood the situation, and he expressed his desire to continue with his counsel of choice (*id.* at A13-A16). In addition, Lynch stated that he had discussed the issue with petitioner and that neither of them believed a conflict existed (*id.* at A15). Accordingly, the record makes clear that petitioner knowingly and voluntarily waived any conflict that might have existed, and it refutes petitioner's contention (Pet. 15-16) that the district court did not adequately explore the possibility of a conflict of interest.

With respect to bookkeeper Montoni, the record discloses that Lynch had neither a significant attorney-client relationship with her nor any conflict of interest stemming from his representation of her at an Internal Revenue Service interview (Tr. 181-182). In fact, petitioner arranged for Lynch's appearance with Montoni at that interview and offered to pay the fee (Tr. 892-895). Furthermore, counsel's cross-examination of Montoni was guided by considerations of trial strategy and was as vigorous as the evidence would permit. Counsel attempted to elicit testimony minimizing petitioner's involvement with invoices and checks while he was out of the office (Tr. 183-190), and counsel highlighted the details of Montoni's prior false statements to the Internal Revenue Service and explored the possibility that her testimony was motivated by her own fear of prosecution (Tr. 190-192).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JANUARY 1986